IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Action4Canada v. British Columbia (Attorney General)*, 2022 BCSC 1507

Date: 20220829
Docket: S217586
Registry: Vancouver

Between:

Action4Canada, Kimberly Woolman, The Estate of Jacqueline Woolman, Linda Morken, Gary Morken, Jane Doe #1, Brian Edgar, Amy Muranetz, Jane Doe #2, Ilona Zink, Federico Fuoco, Fire Productions Limited, F2 Productions Incorporated, Valerie Ann Foley, Pastor Randy Beatty, Michael Martinz, Makhan S. Parhar, North Delta Real Hot Yoga Limited, Melissa Anne Neubauer, Jane Doe #3

Plaintiffs

And

Her Majesty the Queen in Right British Columbia, Prime Minister Justin Trudeau, Chief Public Health Officer Theresa Tam, Dr. Bonnie Henry, Premier John Horgan, Arian Dix, Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, British Columbia Ferry Services Inc. (operating as British Columbia Ferries), Omar Alghabra, Minister of Transport, Vancouver Island Health Authority, The Royal Canadian Mounted Police (RCMP), and the Attorney General of Canada, Brittney Sylvester, Peter Kwok, Providence Health Care, Canadian Broadcasting Corporation, Translink (British Columbia)

Defendants

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiffs: R. Galati

2022 BCSC 1507 (CanLII)

Counsel for the Defendants, Her Majesty the Queen in Right British Columbia, Premier John Horgan, Adrian Dix Minister of Health, Jennifer Whiteside, Minister of Education, Mable Elmore, Parliamentary Secretary for Seniors' Services and Long-Term Care, Mike Farnworth, Minister of Public Safety and Solicitor General, Dr. Bonnie Henry:	M.A. Witten
Counsel for the Defendants, Translink (British Columbia), Peter Kwok:	T.J. Delaney J. Hamilton
Counsel for the Defendants, Providence Health Care, Vancouver Island Health Authority:	T. Wedge L. Miller
Counsel for the Defendants, Attorney General of Canada, Prime Minister Justin Trudeau Chief Public Health Officer Theresa Tam, Omar Alghabra, Minister of Transport, Royal Canadian Mounted Police (RCMP)	A.C. Gatti O. French
Counsel for the Defendants, British Columbia Ferry Services Inc., Brittney Sylvester	C. Bildfell
Place and Date of Hearing:	Vancouver, B.C. May 31, 2022
Place and Date of Judgment:	Vancouver, B.C. August 29, 2022

2022 BCSC 1507 (CanLII)

Table of Contents

INTRODUCTION **4**
ISSUES **4**
THE NOTICE OF CIVIL CLAIM **4**
BASIS OF THE DEFENDANTS' APPLICATION **10**
ANALYSIS **11**
Should the NOCC be struck on the basis that it is prolix? 11
Should the plaintiff's claim be dismissed (or should the plaintiffs be granted leave to amend)? 16
SUMMARY AND CONCLUSION **22**

2022 BCSC 1507 (CanLII)

2022 BCSC 1507 (CanLII)

Introduction

[1] In this action, the plaintiffs seek relief for various hardships and damages they say they have suffered. They seek damages, and other relief, from various government entities and employees. The plaintiffs allege that their damages flow from various restrictions instituted due to the COVID-19 pandemic.

[2] In this application, the defendants, individually and collectively, seek an order striking the notice of civil claim ("NOCC") on the basis that it is deficient in both form and substance. The defendants further submit that the action should be dismissed. I set out their arguments below.

[3] In response, counsel for the plaintiffs submits that the claim should be allowed to proceed in its current form. Alternatively, counsel submits that if I find that the current pleading is improper, I should grant leave to amend it.

Issues

[4] The issues for me to decide are:

a) Should the NOCC be struck in whole or in part?

b) Should the plaintiffs be granted leave to amend?

[5] For the reasons set out below, my answers to these questions are:

a) Yes, the NOCC is prolix and must be struck.

b) Yes, the plaintiffs should be granted leave to amend.

[6] I set out my reasoning below.

The Notice of Civil Claim

[7] In order to understand my reasons below, it is necessary to describe the basis of the plaintiffs' claims and the characteristics of the NOCC.

[8] First, this action derives from the health orders, restrictions and lockdowns declared by the Federal and Provincial governments in relation to the COVID-19 pandemic. In broad overview, the plaintiffs say that the government measures:

a) were not based on science;

b) exceeded the authority of the government agencies;

c) resulted in restrictions that breached the *Charter* rights of the plaintiffs; and

d) caused damages.

[9] The plaintiffs complain about government actions in four general areas:

a) coercive vaccination mandates;

b) masking;

c) lockdowns, restrictions on gatherings and social distancing; and

d) PCR testing.

[10] I should note that my understanding of the claim, as described in the prior two paragraphs, derives primarily from the submissions of plaintiffs' counsel at the hearing of this application and not from my reading of the NOCC itself.

[11] The NOCC is 391 pages long.

[12] The original NOCC named as plaintiffs:

a) Action4Canada;

b) twelve named individuals;

c) three individuals identified as Jane Doe 1, 2 and 3;

d) one estate; and

2022 BCSC 1507 (CanLII)

e) three corporate entities.

[13] Action4Canada is described as a grassroots organization centered in British Columbia. It was “co-founded” in 2019. It has no legal existence. It is not an incorporated entity.

[14] Four of the original plaintiffs are no longer involved in the action:

a) One individual plaintiff and the estate discontinued their participation in the proceeding.

b) One individual, Mr. Makhan Parhar, died. His claim, and the claim of his business, North Delta Real Hot Yoga Limited, have abated.

[15] Thus, as the matter now stands there are ten individual named plaintiffs, three Jane Does and two corporate entities. In addition, there is Action4Canada.

[16] The plaintiffs’ claims fall into several categories of allegations. I describe them briefly below. In summarizing the allegations, I do not mean to diminish the alleged harm suffered by any of these plaintiffs. My purpose is simply to categorize the nature of their claims. For context, the next ten subparagraphs describe the allegations set out in more than 290 subparagraphs comprising 75 pages of the NOCC.

a) Two individual plaintiffs ran businesses that were negatively affected by the public health orders.

b) One plaintiff alleges she was assaulted and unlawfully arrested by transit police while riding the SkyTrain without a mask.

c) Two plaintiffs allege they were harassed by grocery store employees in Sooke, and then unlawfully arrested by the RCMP because they were not masked.

2022 BCSC 1507 (CanLII)

d) Two plaintiffs allege that they were mistreated, or banned, by BC Ferries staff as a result of their refusal to wear masks.

e) One plaintiff is a pastor who continued to hold church services after public health orders required his church to cease. The continuation of church services led to interactions with RCMP and threats of by-law infraction tickets being issued if the conduct continued.

f) One plaintiff arrived at Vancouver Airport from an international flight and proceeded through the airport without a mask, leading to a fine of $3,450. There is no indication whether he contested that ticket in another forum.

g) One plaintiff, a teacher in the BC Public School system, obtained accommodations regarding mask-wearing from her employer in the 2020-2021 school year but was later advised that she would not be rehired for the next school year. There is no indication whether her employment relationship would be governed by a collective agreement.

h) One plaintiff was a patient at St. Paul's Hospital and was forced to leave the hospital because she (and her parents) refused to wear a mask.

i) One plaintiff is a nurse-aid in a long-term care facility who alleges that the public health measures created a stressful environment for her and many people like her. She "feels concerned not only for herself but also for her clients."

j) One plaintiff is a health-care worker at Royal Inland Hospital who faced employer mandates to wear masks and get vaccinated. Again, there is no indication whether her employment relationship would be governed by a collective agreement.

[17] These individual claims occurred at what I will describe as the "operational" level. In each of these interactions, the public agencies involved were enforcing the

2022 BCSC 1507 (CanLII)

health mandates issued by the Federal Government and the Province of British Columbia.

[18] The allegations at the operational level are then linked to the allegedly overreaching and ill-advised health mandates imposed by each level of government. Those mandates, in turn, are linked to individuals within government, either elected or employed.

[19] The description of the defendants comprises 20 paragraphs set out over three pages of the NOCC. The defendants fall into five separate categories:

a) the Crown (both Federal and Provincial);

b) Ministers of the Crown (both Federal and Provincial);

c) Public Health Officers (both Federal and Provincial);

d) Crown agencies, including the Canadian Broadcasting Corporation, British Columbia Ferry Services Inc., The Royal Canadian Mounted Police, Vancouver Island Health Authority, Providence Health Care and Translink (British Columbia); and

e) individual employees of Crown agencies.

[20] The description of “THE FACTS” in the NOCC comprises 316 paragraphs set out over 226 pages. This section of the NOCC also includes 399 footnotes, the majority of which contain links to websites.

[21] I note, for the clarity of anyone reading the pleadings, that the numbering of the paragraphs in the NOCC leads to further confusion. First, there are two paragraphs numbered “12”. More problematic, the paragraphs proceed from 1-331 followed, for no reason, by paragraphs 255-363. As a result, the section labelled “THE FACTS” appears to comprise only 240 paragraphs (44-284), when it actually consists of 316 paragraphs. It follows that the reader must be careful to address

2022 BCSC 1507 (CanLII)

either the first, or the second, paragraph 255 etc. I return to this issue below when discussing the second paragraph 289.

[22] The "RELIEF SOUGHT" section of the NOCC comprises 40 paragraphs, most with multiple subparagraphs, set out over 43 pages.

[23] The plaintiffs (individual, corporate and Action4Canada) seek general damages for breaches of their Charter rights. Each plaintiff claims a set amount of general damages. In addition, as against the defendant, Canadian Broadcasting Corporation, the plaintiffs collectively seek general damages of $10,000,000 and punitive damages of $10,000,000. I note that the pleading of specific amounts for general damages is clearly in violation of Rule 3-7(14) of the *Supreme Court Civil Rules*, B.C. Reg 168/2009 [*Rules*].

[24] The first paragraph under the "THE FACTS" heading states:

> 44. In 2000 Bill Gates steps down as Microsoft CEO and creates the "Gates Foundation'' and (along with other partners) launches the 'Global Alliance for Vaccines and Immunization ("GAVI''). The Gates Foundation has given GAVI approximately $4.1 Billion. Gates has further lobbied other organizations, such as the World Economic Forum ("WEF") and governments to donate to GAVI including Canada and its current Prime Minister, Justin Trudeau, who has donated over $1 billion dollars to Gates/GAVI.

[25] I set out this paragraph to illustrate the wide-ranging and unconstrained nature of the allegations in the NOCC. The defendants submit that the NOCC makes allegations about the acts and motivations of many non-parties. That submission is correct.

[26] Many of the allegations contained in the NOCC do not accord with, and specifically challenge, the mainstream understanding of the science underlying both the existence of, and the government's responses to the COVID-19 pandemic. The defendants submit that the allegations in the NOCC constitute "conspiracy theories". In response, the plaintiffs submit that they have pled material facts that expose "conspiracies". The former expression, used by the defendants, is recognized as a pejorative term. The latter, used by the plaintiffs, alleges that the NOCC is exposing

2022 BCSC 1507 (CanLII)

an underlying systemic issue relating to the pandemic. Those allegations are, in turn, tied to allegations of misfeasance in public office. The plaintiffs also allege criminal conduct by the defendants.

[27] To be clear, in these reasons, I have not attempted any weighing, limited or otherwise, in respect of the facts alleged by the plaintiffs. I have undertaken my assessment on the assumption that the plaintiffs' allegations, if properly pleaded, are capable of being proven at trial.

2022 BCSC 1507 (CanLII)

Basis of the Defendants' Application

[28] A summary of the defendants' submissions is as follows:

a) The NOCC is prolix.

   i. The *Rules* provide that a pleading must set out a concise statement of the material facts, the relief sought and a concise summary of the legal basis.

   ii. The *Rules* on pleadings are mandatory. Failure to follow the *Rules* will lead to a striking of the pleading.

b) Because of the prolix and wide-ranging nature of the NOCC, it is not capable of being answered by the defendants.

c) The entirety of the claim is frivolous and vexatious. After striking the NOCC, I should not allow the plaintiffs an opportunity to amend it.

[29] In response to the application, the plaintiffs submit that the court should look to first principles:

a) On an application to strike:

   a. the allegations pleaded in the NOCC must be taken as true or capable of being proven to be true; and

   b. the court's role is not to reach a decision on the claim's chance of success.

b) The fact that a pleading reveals an arguable, difficult or important point of law, is not a justification to strike it: *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959.

c) The plaintiffs' right to seek declaratory relief is neither constrained by form nor bounded by substantive content: *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 830.

d) The constitutionality of legislation is always a justiciable issue: *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 at 151.

e) The writ of *mandamus* is the proper writ to correct government overreach.

[30] In summary, the plaintiffs submit that there are *Charter* rights affected by government policies. This may be a long and complex piece of litigation, with difficult and troubling allegations, but that does not mean that it should be dismissed. Again, I garner that summary from the plaintiff's submissions on this application, not from the NOCC.

Analysis

[31] I will deal with the defence submission in two stages. First, whether the NOCC should be struck. Second, whether the plaintiffs should be granted liberty to amend.

Should the NOCC be struck on the basis that it is prolix?

[32] The Oxford English Dictionary defines "prolix" as writing that is "tediously lengthy". At 391 pages, the NOCC is clearly prolix.

[33] Prolixity can warrant striking a claim pursuant to R. 9-5(1), which reads:

> **Scandalous, frivolous or vexatious matters**
>
> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence, as the case may be,

2022 BCSC 1507 (CanLII)

> (b) it is unnecessary, scandalous, frivolous or vexatious,
>
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

2022 BCSC 1507 (CanLII)

[34] The defendants submit the NOCC's prolixity renders it scandalous within the meaning of subrule 9-5(1)(b). The defendants also submit that prolixity falls under subrule 9-5(1)(c) and constitutes a further basis to strike:

a) Pleadings are embarrassing where they are prolix, contain argument, or fail to state the real issue in an intelligible way: *Sahyoun v. Ho*, 2015 BCSC 392 at para. 62 [*Sahyoun*].

b) Regardless of the subrule, the law is clear that prolixity can be a basis for striking where the pleadings are prolix and confusing or they render it impossible for the opposing party to know the case they must meet*: The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2009 BCSC 473 at para. 36.

c) In certain cases, the pleadings are so overwhelmed with difficulties that it will not be possible to categorize them into specific subparagraphs of R. 9-5(1): see, for instance, *Sahyoun* at para. 64.

[35] The defendants submit that, more important than the length of the NOCC is the unlimited scope of the document. It is not a piece of legal drafting that complies with the *Rules*, or basic tenets, of pleading. It is not a document that can be properly answered in a response to civil claim. The defendants submit that those problems arise, in part, because there are multiple allegations against the defendants individually and jointly. It would be extremely difficult, if not impossible, for any individual defendant to determine whether it is required to respond to any particular allegation. Were the action to proceed in its current form, individual defendants would not be in a position to know whether they were tasked with a burden of

disproving or countering the myriad allegations. They would not know what case they were required to meet.

[36] The defendants rely on the decision in *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 [*Mercantile*] wherein Voith J.A. wrote, in relation to the requirements of pleadings:

> [44] Nevertheless, none of a notice of claim, a response to civil claim, and a counterclaim is a story. Each pleading contemplates and requires a reasonably disciplined exercise that is governed, in many instances in mandatory terms, by the *Rules* and the relevant authorities. Each requires the drafting party to "concisely" set out the "material facts" that give rise to the claim or that relate to the matters raised by the claim. None of these pleadings are permitted to contain evidence or argument.

[37] I note again paragraph 44 of the NOCC (above at paragraph 24). It is, quite clearly, the beginning of a "story".

[38] Justice Voith continued in his conclusion in *Mercantile*:

> [58] I am of the view that the Response and Counterclaim suffer from the numerous and pervasive difficulties that I have described. These difficulties cause the Response and Counterclaim to be prolix and both confusing and inconsistent in various respects. They offend various mandatory requirements of the *Rules* and they frustrate the important objects that are served by proper pleadings.

[39] I note, for context, that the response to civil claim in under discussion in *Mercantile* was 12 pages and the counterclaim was five pages.

[40] In addition, the defendants submit that the NOCC breaches other tenets of pleading. Among other problems: it pleads evidence, includes non-justiciable claims and alleges criminal conduct by the defendants. These deficiencies fall largely within the scope of R. 9-5(1)(a), in that they disclose no reasonable claim.

[41] As an example of the plaintiffs' non-justiciable claims, the defendants point to (the second) paragraph 289 of the NOCC which seeks the following declaration:

> 289. A Declaration that the purported order, by Dr. Bonnie Henry, purportedly pursuant to s. 52(2) of the *Public Health Act*, that "the transmission of the infectious agent SARS-CoV-2, based on high "case

2022 BCSC 1507 (CanLII)

> counts", based on a PCR test, is *ultra vires* the *Act* and *non est factum*, in that:
>
> …
>
> (b) The classification as such is not scientifically nor medically based;
>
> (c) The evidence is lacking and contrary to the scientific and medical evidence;
>
> (d) That "cases' [*sic*] do not equate to "deaths" and that the purported death rate is no higher than complications from the annual influenza;
>
> (e) That the distorted "case" counts are fraudulent, based on the fraudulent use generating cases of "PCR" test, which is a test that:
>
> a) At best was designed as a "screening test" which requires a follow-up culture and blood test to ensure the detection of an infectious virus, and was never designed, nor equipped to be a diagnostic test;
>
> b) That is is [*sic*] fraudulently being used as a diagnostic test;
>
> c) That the PCR test has scientifically been debunked, as well as judicially determined, based on the scientific evidence, that when used at a "threshold cycle" of thirty five (35) or higher, to cause between 82% to 96.5% "false positives";
>
> …

[42] The defendants submit that this is (or these are) issues and remedies that are non-justiciable.

[43] In response to these submissions, counsel for the plaintiffs submits:

a) the NOCC pleads all material facts necessary to support the causes of action;

b) all causes of action have been fully and properly pled;

c) there is no basis in law to strike the NOCC, in whole or in part;

d) the court should only strike a pleading where it is plain and obvious that it is "bad beyond argument": *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at 176; and

e) The extent and complexity of the NOCC is proportionate to the extent and complexity of the issues at hand. Counsel describes those issues as: "the purported global pandemic, these scientific/medical bases or non-basis of the

2022 BCSC 1507 (CanLII)

> [COVID] measures, its history, and the constitutional violations imposed in Canada and abroad."

[44] On that basis, the plaintiffs submit that they should be allowed to proceed with the litigation under the current version of the NOCC.

[45] On the first issue, whether the NOCC is prolix, I agree with the defendants' submission: the NOCC, in its current form, is not a pleading that can properly be answered by a responsive pleading. It describes wide-ranging global conspiracies that may, or may not, have influenced either the federal or the provincial governments. It seeks rulings of the court on issues of science. In addition, it includes improper allegations, including criminal conduct and "crimes against humanity". In my opinion, it is "bad beyond argument".

[46] I further find that it is not a document that the court can mend by striking portions. I find that this NOCC is analogous to the Statement of Claim considered by Justice K. Smith (as he then was) in *Homalco Indian Band v. British Columbia* (1998), 25 C.P.C. (4th) 107 (B.C.S.C.) [*Homalco*]. He wrote:

> [11] In my view, the statement of claim is an embarrassing pleading. It contains much that appears to be unnecessary. As well, it is constructed in a manner calculated to confuse the defendants and to make it extremely difficult, if not impossible, to answer. As a result, it is prejudicial. Any attempt to reform it by striking out portions and by amending other portions is likely to result in more confusion as to the real issues. …

[47] As was the case in *Homalco*, attempting to bring the NOCC into compliance with the *Rules* by piecemeal striking and amending would invite more confusion and greater expenditure of the resources of all concerned.

[48] I find that the NOCC is prolix. It is not a proper pleading that can be answered by the defendants. It cannot be mended. Given that finding, I have no hesitation in ruling that it must be struck in whole.

2022 BCSC 1507 (CanLII)

Should the plaintiff's claim be dismissed (or should the plaintiffs be granted leave to amend)?

[49] The second issue in this case is whether the plaintiffs should be granted leave to amend the pleadings.

[50] In my discussion below, I have indicated that there may be legitimate claims that a plaintiff could advance against one or more of the defendants. However, I wish to be clear that:

a) as noted above, I have assumed that allegations are capable of being proved;

b) hence, by ruling that there may be claims that might properly be brought, I make no finding on the prospect of success of such claims;

c) although I have specifically noted certain types of claims that are improperly included in the current NOCC, the absence of any comment by me should not be considered an endorsement of any specific cause of action that is in the NOCC but omitted in my discussion; and

d) I make no ruling on the proper plaintiffs, or the proper defendants, in this action. Those will be issues for the plaintiffs to decide, in line with the proper tenets of pleading. In turn, the defendants will be at liberty to make an application, if necessary, to determine the proper parties.

[51] To put those points another way, I have indicated above that the prolix nature of the NOCC makes it impossible for the defendants to respond to it. For the same reason, I am not able to parse the 391 pages of the improperly drafted NOCC and indicate whether paragraphs, categories or claims should remain in, or should be struck. That is not the proper role of this court. It is counsel's obligation to draft pleadings that do not offend the mandatory requirements of the *Rules.*

[52] The defendants submit that the NOCC pleads to a number of claims that are improper in a civil action. In part, the defendants point to the following elements of the NOCC as inappropriate:

2022 BCSC 1507 (CanLII)

a) alleging criminal conduct;

b) seeking a declaration that the preponderance of the scientific community is of the view that masks are ineffective in preventing transmission;

c) seeking a declaration that the motive and execution of the COVID-19 prevention measures by the World Health Organization are not related to a *bona fide* “pandemic”;

d) seeking a declaration that administering medical treatment without informed consent constitutes experimental medical treatment which is contrary to the Nuremberg Code, the Helsinki Declaration and is a crime against humanity under the *Criminal Code* of Canada;

e) seeking a declaration that the unjustified, irrational, and arbitrary decisions of which businesses would remain open, and which would close, as being “essential”, or not, was designed and implemented to favour mega-corporations and to *de facto* put most small businesses out of business; and

f) seeking a declaration that the measures of masking, social distancing, PCR testing, and lockdowns are not scientifically based, and are based on a false and fraudulent use of the PCR test.

[53] I agree with the defendants that these are improper claims.

[54] I note the remarkably apposite comments of Strayer J. in *Vancouver Island Peace Society v. Canada,* [1992] 3 F.C. 42 at 51:

> … It is not the role of the Court in these proceedings to become an academy of science to arbitrate conflicting scientific predictions, or to act as a kind of legislative upper chamber to weigh expressions of public concern and determine which ones should be respected. Whether society would be well served by the Court performing either of these functions, which I gravely doubt, they are not roles conferred upon it in the exercise of judicial review ...

[55] A significant underlying theme of the NOCC is the pursuit of rulings from this court on the proper interpretation of scientific data. As such, much of the NOCC

2022 BCSC 1507 (CanLII)

relates to non-justiciable issues. I note the extract from (the second) paragraph 289 of the NOCC quoted above (at paragraph 41). It is beyond doubt that the plaintiffs seek to turn this court into an academy of science wherein a judge will be asked to prefer their science over the government's science. Alternatively, the plaintiffs hope that this court will act as a further legislative chamber to review, criticize or overturn the policies of the legislative and executive branches of government. That is not the proper role of this court except in circumstances where those actions infringe on protected *Charter* rights or exceed the bounds of delegated authority.

[56] An additional issue, related to justiciability, is that the NOCC seeks a number of declarations of fact. In *West Moberly First Nations v. British Columbia*, 2020 BCCA 138 at para. 312, the Court of Appeal reviewed the law concerning the propriety of declaratory relief. The Court noted that even when the requirements set out in *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4 at para. 60 are met, declaratory relief remains discretionary:

> [310] Where these factors are met, a court looks at the practical value of the declaration in assessing if it should exercise its discretion to grant such a remedy:
>
> > A declaration can only be granted if it will have practical utility, that is, if it will settle a "live controversy" between the parties: see also *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821; *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342.
> >
> > *Daniels* at para. 11; see also *S.A.* at para. 61.
>
> [311] This Court has also phrased the question as "whether a 'useful purpose' would be served by granting the order": *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 71; see also *Greater Vancouver Regional District v. British Columbia (Attorney General)*, 2011 BCCA 345 at para. 52 [*GVRD*].
>
> [312] An assessment of the practical utility of a declaration necessarily looks at the effect of the requested remedy on the parties' rights. Declarations must be connected to legal rights, rather than, for example, facts "detached" from those rights or "law generally": *1472292 Ontario Inc. (Rosen Express) v. Northbridge General Insurance Company*, 2019 ONCA 753 at para. 30; *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435 at 501. Detached facts and general pronouncements of law have little utility.
>
> [Emphasis added.]

2022 BCSC 1507 (CanLII)

[57] A good example of a proposed declaration of fact is set out at (the second) para. 302 of the NOCC where the plaintiffs seek:

> A Declaration that the declared rationales and motives, and execution of COVID Measures, by the WHO, are not related to a bona fide, nor an actual 'pandemic', and declaration of a bona fide pandemic, but for other political and socio-economic reasons, motives, and measures at the behest of global Billionaire, Corporate and Organizational Oligarchs

[58] This is just one example, among many, of a declaration that is detached from law generally. It has little to do with the rights of the parties and instead seeks a declaration of fact about the motives of a non-party international organization. Pleading declaratory relief of this nature is improper.

[59] The defendants urge upon me that the problems with the NOCC are sufficient grounds for me to conclude that this entire action is an abuse of process and should be dismissed on the basis that it is clearly frivolous and vexatious.

[60] I do not accept that submission on behalf of the defendants. For the reasons set out below, I decline to dismiss the action.

[61] In support of the claims made within the NOCC, counsel for the plaintiffs directed me to several Canadian decisions, plus two from other countries:

a) The Supreme Court of the United States decision indexed as *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, 592 U.S. ___ (2020) [*Diocese of Brooklyn*]; and

b) *Jacob Puliyel v. Union of India* (2 May 2022), Writ Petition (Civil) No. 607 of 2021 (Supreme Court of India) [*Puliyel*].

[62] In the *Diocese of Brooklyn* decision, the Court enjoined the state from enforcing the "severe" restrictions on religious services. The majority wrote, at page 5:

> Members of this Court are not public health experts, and we should respect the judgment of those with special expertise and responsibility in this area. But even in a pandemic, the Constitution cannot be put away and forgotten.

2022 BCSC 1507 (CanLII)

> The restrictions at issue here, by effectively barring many from attending religious services, strike at the very heart of the First Amendment's guarantee of religious liberty. Before allowing this to occur, we have a duty to conduct a serious examination of the need for such a drastic measure.

[63] Hence, the *Diocese of Brooklyn* decision assists the plaintiffs for the (obvious) proposition that constitutional rights must be protected, even within a pandemic.

[64] The plaintiffs also rely upon the *Puliyel* case from India as an example of a court striking down the COVID-vaccine measures of a government on the basis that they offended protections of bodily integrity and hence, were unconstitutional.

[65] I note that cases from the Indian Supreme Court are very rarely referenced in this jurisdiction. I accept that the judge in the *Puliyel* case engaged in a review of vaccine mandates and their impact on constitutionally protected rights. However, in my opinion, the *Puliyel* case provides limited assistance to the plaintiffs. In very brief overview, the highest level of intervention by the court consisted of directions that:

a) the government could not force vaccinations on the populace. But, the court was clear to note that the government was not forcing vaccines on the populace. At the same time, the court confirmed that, given the pandemic, the government could restrict the activities of unvaccinated persons and is "entitled to regulate issues of public health concern by imposing certain limitations on individual rights…"

b) required the government to release statistics to the public relating to vaccination programs; and

c) in addition, the court made a "suggestion", that in the context of the rapidly-evolving situation presented by the COVID-19 pandemic, the government should review the vaccine mandates.

[66] However, in my opinion, the case provides more support for the defendants' position than the plaintiffs'. For example, at para. 89, Justice Rao wrote:

> (iv) On the basis of substantial material filed before this Court reflecting the near-unanimous views of experts on the benefits of vaccination in

2022 BCSC 1507 (CanLII)

> addressing severe disease from the infection, reduction in oxygen requirement, hospital and ICU admissions, mortality and stopping new variants from emerging, this Court is satisfied that the current vaccination policy of the Union of India is informed by relevant considerations and cannot be said to be unreasonable or manifestly arbitrary. Contrasting scientific opinion coming forth from certain quarters to the effect that natural immunity offers better protection against COVID-19 is not pertinent for determination of the issue before us.

[67] There are several other statements in the *Puliyel* decision that do not align with the plaintiffs' position in this case. For example, on paediatric vaccinations, Rao J. ruled "it is beyond the scope of review for this Court to second-guess expert opinion, on the basis of which the Government has drawn up its policy."

[68] Boiled down to its core, the *Puliyel* case provides support for two basic points that assist the plaintiffs:

a) government policies cannot unnecessarily infringe upon the Charter rights of individuals; and

b) the decision is an example of a court hearing, and (to some extent) ruling upon, an analogous claim on its merits. In doing so, the court dismissed the preliminary objection of the Union of India.

[69] I note that there is little need to exceed our province's borders for either of these two propositions. There is binding authority for those propositions much closer to home. In particular, Chief Justice Hinkson, in *Beaudoin v. British Columbia,* 2021 BCSC 512, ruled that the petitioners' *Charter* rights (s. 2(c) and (d)) were infringed by specific "Gathering and Events" orders issued by the Provincial Health Officer. (I note that decision is under appeal. However, at present it is binding upon me pursuant to the principles enunciated in *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590.)

[70] On whether the issues are "justiciable" I note the decision of Justice Coval in *Canadian Society for the Advancement of Science in Public Policy v Henry*, 2022 BCSC 724, where he wrote, at para. 39:

2022 BCSC 1507 (CanLII)

> [39] Regarding justiciability, the Petition challenges state action based on legislatively-delegated discretionary powers. In my view, the petitioners are correct that whether those actions comply with the *Charter* and *JRPA* are clearly questions suitable for judicial determination (*CCD*, para 90).

[71] Put simply, individuals have standing to question whether state actions infringe their *Charter* protected rights. Hence, in this case, there is a prospect that the plaintiffs could put forward a valid claim that certain of the COVID-based health restrictions instituted by the Federal or Provincial governments infringed their *Charter* rights. In addition, it is possible that other valid claims may exist. It will be for the plaintiff to plead those causes of action in accordance with the *Rules.* Such claims need to be framed in a manner that is intelligible and allows the defendants to know the case they have to meet. It must also confine itself to matters that are capable of adjudication by this court and relief this court is capable of granting.

[72] The existence of a single potential, viable cause of action means that it would be improper for me, at this stage, to foreclose upon the plaintiffs' right to bring their claims. I note that, in the *Homalco* decision, despite finding that the plaintiff's pleading was "embarrassing" Smith J. granted leave to amend because potential causes of action existed. In doing so, he stayed further steps pending the filing and delivery of a fresh pleading by the plaintiff. I make the same order. This action is stayed until the filing of a fresh pleading by the plaintiff.

[73] I noted above the defendants' submission that there are sufficient grounds for me to conclude that, based on the NOCC, this entire action is an abuse of process or clearly frivolous and vexatious. For the reasons set out above, I do not accept that submission. However, if the next iteration of NOCC contains the same, or similar, problems, then the defendants' arguments on these issues will be strengthened.

Summary and Conclusion

[74] In summary:

a) I find that the NOCC, in its current form, is prolix and must be struck in its entirety;

2022 BCSC 1507 (CanLII)

b) I grant the plaintiffs liberty to amend the NOCC; and

c) This action is stayed pending the filing of a fresh pleading.

[75] On the issue of costs, I note that each plaintiff is pursuing this action seeking money damages from one or more defendant. In responding to those claims each defendant has been put to the expense of answering (if not filing a response) to the NOCC. In addition, the defendants have all been required to prepare for and conduct this application. None of those steps would have been necessary if the matter was properly pleaded.

[76] On that basis, I find it appropriate to award each defendant the costs for the necessary steps of “defending a proceeding”, and for preparing for and attending an application (opposed). Those costs are payable forthwith in any event of the cause.

“A. Ross J.”

2022 BCSC 1507 (CanLII)